

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

HARDING GLASS COMPANY, INC.

And

**Case Nos. 1-CA-31148
1-CA-31158**

**GLAZIERS LOCAL 1044, INTERNATIONAL BROTHERHOOD
OF PAINTERS & ALLIED TRADES, AFL-CIO**

*Karen Hickey, Esq., and Sandra Clodomir, Esq., Counsel for the General Counsel.
Michael Feinberg, Esq., Feinberg, Campbell & Zack, P.C., Counsel for Charging Party.
Robert Weihrauch, Esq., Counsel for the Respondent.*

SUPPLEMENTAL DECISION

Joel P. Biblowitz, Administrative Law Judge: This case was heard by me on May 2, 2005 in Boston, Massachusetts. The Third Amended Compliance Specification, which issued on January 19, 2005, alleges that Harding Glass Company, Inc., herein the Respondent, owes the amount of \$504,142.32 plus interest accrued to the date of payment. This amount is due as wages to Robert Mosely, James Tritone, Richard Poirer, James Gabrielle, Richard VonMerta, David Elworthy, Christopher Carle, Christopher Pelletier and Kenneth Bullock as well as to the following funds of Glaziers Local 1044, International Brotherhood of Painters & Allied Trades, AFL-CIO, herein called the Union: the Health and Welfare Fund, the Pension Fund, the Annuity Fund and the Apprenticeship Fund.

I. Background

On March 31, 1995, the Board issued the underlying Decision and Order herein at 316 NLRB 985, finding that the Respondent violated Section 8(a)(5) of the Act by unlawfully implementing, as its last and final offer, certain unilateral changes in its employees' terms of employment, effective on October 23, 1993, and that this change was made in the absence of a valid impasse in bargaining. On March 17, 1996, the United States Court of Appeals for the First Circuit enforced this portion of the Board's Order, and directed the Respondent to restore all terms and conditions of employment to the status quo as it existed on October 23, 1993, and to make whole all employees, and the Union funds, with interest, for any loss they may have suffered as a result of Respondent's unlawful unilateral changes. The Court, however, declined to adopt the Board's additional finding that the economic strike which began on October 18, 1993 was converted to an unfair labor practice strike on October 25, 1993, and therefore denied enforcement of that portion of the Board's Order.

Counsel for the Respondent, in his Answer to the Amended Compliance Specification which issued on January 20, 2000, included numerous defenses which Counsel for the General Counsel felt were improper because they contravened the Board and the Court's findings. Counsel for the General Counsel notified counsel for the Respondent that his Answer failed to meet the requirements of Section 102.56 of the Board's Rules and Regulations and that General Counsel would file a Motion for Partial Summary Judgment if the Respondent did not file an appropriate amended answer. On May 19, 2000, Counsel for the General Counsel filed with the Board a Motion to Strike Portions of the Respondent's First Amended Answer to the Original Amended Compliance Specification and for Partial Summary Judgment. On August 1,

2002, the Board issued a Supplemental Decision and Order (at 337 NLRB 1116), finding that the Respondent's Answer did not comply with the requirements of Section 102.56(b) and (c) of the Board's Rules and Regulations and that all of the Respondent's Affirmative Defenses were without merit. The Board therefore ordered that the Respondent's affirmative defenses be stricken, and granted the General Counsel's Motion for Partial Summary Judgment with respect to paragraphs 1 through 10 and 12 through 21 of the amended compliance specification, relating to the backpay period and the backpay calculations for all the employees. Pursuant to this Decision, the only issues that Respondent could litigate were the amount of interim earnings and expenses of each of the employees and the status of James Tritone.

II. The Facts and Analysis

A. Interim Earnings

Regardless of the large amount of backpay and money due to the named employees and the Union funds herein, the hearing herein was extremely limited because of the Board's Supplemental Decision on Counsel for the General Counsel's Motion to Strike. Even the issue of interim earnings, which normally would produce extensive testimony regarding the adequacy of the search for replacement employment and the wages therein is not a factor here because of the nature of the violation, and the fact that the interim employment was with the Respondent. As no evidence was introduced to contradict the interim earnings set forth in the Third Amended Compliance Specification, I find that the amounts set forth therein are correct.

B. The Strike

The economic strike herein began on October 18, 1993. At the time, the Respondent employed five unit employees, two glaziers, Tritone and Charles Jones, and three glass workers, including Mosely. Tritone and Mosely are the only employees employed by the Respondent at that time who are named herein. All of the glass workers returned to work after being on strike for one week. Jones never returned to Respondent's employ and obtained employment as a glazier elsewhere. As will be discussed, *infra*, Tritone returned from Workmens' Compensation status to work for the Respondent on March 28, 1994 and worked until April 15, 1994, when he returned to Workmens' Compensation status and filed for, and received, Social Security disability benefits. Of the other eight employees named in the Compliance Specification, five are glass workers and three are glaziers. The Union has separate contracts with the Respondent and other employers for glass workers and glaziers. Glass workers often perform inside fabrication work and residential and automobile glass replacement work, while glaziers measure, fabricate and install glass windows for store fronts and commercial customers. The hourly rate set forth for glaziers in the Glaziers' 1991-1993 contract was \$22.05; the hourly rate for glass workers in the 1991-1993 Glass Workers' contract was \$13.23.

The Compliance Specifications provide that backpay of the named replacement employees commenced on June 5, 1996, because the Union notified the Respondent on June 4, 1996 that the strike was terminated at that time. The basis of this finding is the June 4, 1996 letter that Union Business Manager sent to Robert Weihrauch, Esq., counsel for the Respondent. The letter states, *inter alia*:

It is Local 1044's position that by January 1, 1994 its strike against Harding Glass was concluded. By that date, all striking employees (i.e. the glaziers) who were able to work had found other jobs and were not seeking reinstatement with Harding Glass. In addition, by that date Local 1044 had ceased its picketing at Harding Glass.

As no substantive evidence was introduced to contradict the assertions contained in this letter, I agree with Counsel for the General Counsel's position that the Union's economic strike commenced on October 18, 1993 and concluded on June 4, 1996 and that the backpay period for the replacement workers began on the following day.

C. The Status of James Tritone

The only issue remaining for consideration, pursuant to the Board's Supplemental Decision and Order, is Tritone's status. The issue is whether he should have been paid as a glazier, his job classification prior to the strike, or as a glass worker for the period that he worked from March 28 to April 15, 1994. The difference is the contractual rate contained in the 1991-1993 contract, for glaziers, \$22.05 an hour, or for glass workers, \$13.23 an hour. For the three week period that Tritone worked for the Respondent in 1994 he was paid \$13.73 an hour, without any Union benefits. Tritone began working for the Respondent as a glazier in 1988. As a glazier, he fabricated frames and doors, measured and cut glass and installed windows and doors in store fronts. In April 1993 he severed his wrist, cut a tendon and shred the nerves in his wrist. From that time through October 18, 1993 he was performing his regular glazier duties, although he was under medical care for his injury. The picketing of the Respondent's facility commenced on October 18, 1993, the same day that he had surgery on his wrist. He joined the strike and picketing on that day and did not return to work until March 28, 1994.

On January 31, 1994, Mark Goldstein, Respondent's owner, wrote to Tritone that Tritone's doctor indicated that he could return to work on a modified light duty program. The letter continued:

We are offering you a modified duty (light work) job measuring storefronts, repairing house windows, polishing small pieces of glass, installing door closures, to name a few.

We are offering you 100% of our current glaziers pay rate which is \$13.73 per hour with Blue Cross HMO as health coverage paid by Harding Glass Co. Our desire is that, under strict medical supervision, you return to work with job restrictions, immediately.

Please indicate below whether you accept or reject the offer of modified-duty employment as described herein. If we do not hear from you by February 11, 1994, we will assume you have rejected our offer and will proceed accordingly.

Tritone testified that he believes that his lawyer wrote to Goldstein saying that the job offered did not comport with the restriction imposed by his doctor. In response, Goldstein wrote to Tritone on March 15, 1994 stating:

We are pleased to offer you a permanent light duty full time position consisting of calling on prospective customers, measuring work at job sites, picking up and delivering customers' automobiles. Your wage will be \$13.73 per hour plus an employer paid Blue Cross/Blue Shield HMO.

We must hear from you on or before March 24, 1994, otherwise, we will assume you have rejected our offer.

Tritone testified that he believes that his attorney notified the Respondent that he would accept that job offer, and by letter dated March 21, 1994, Goldstein again wrote to Tritone, stating:

We would like to clarify the position that is available to you beginning March 28, 1994. This is a temporary modified duty position consisting of calling on prospective customers, measuring work at jobsites, picking up and delivering customer's automobiles, and general office procedures.

This position is available for forty five days at which time we will evaluate your ability to perform your regular duties as a glazier.

We look forward to seeing you on March 28, 1994.

On his first day of work upon returning, March 28, 1994, he saw a notice posted at the time clock. He had never seen it during the period of his prior employment with the Respondent. Entitled: "Modified-Duty Policy," it states, *inter alia*:

Harding Glass Co., Inc. workers' compensation program has several distinct goals.

1. To provide employees with prompt, high quality care for their work-related injuries;
2. To compensate workers during the time they are disabled and unable to work; and
3. To return injured employees to full duty in the work force as soon as possible.

To help us achieve these goals, we have instituted a modified-duty policy. Modified duty is temporary (no longer than 45 days). It is a process that provides full wages for an injured employee during recovery...

Management Rights

Job transfer: Any employee who, as a result of an accident on or off the job, or chronic disease or condition, is unable to perform his/her duties, shall be transferred to another position if work is available for which he/she is qualified or can be retrained within a reasonable period of time. He/she shall retain full seniority rights and wages.

The work that Tritone performed from March 28 through April 15, 1994 was substantially different from the work that he had previously performed for the Respondent. During this earlier period, the principal work that he performed was fabricating and installing store front glass windows and doors. So that, if a glass door or window at a store or other commercial facility was broken, or had to be replaced for any other reason, he measured the area, cut the replacement glass and, probably with another employee, installed the new glass door or window. For the period March 28, 1994 to April 15, 1994, he measured store fronts and, occasionally, picked up a car and drove it back to Respondent's shop where the glass workers performed the required repairs. The only "tools" that he carried were a tape measure, a ruler, paper and a pencil; he no longer carried, or used, a glass cutter. Goldstein testified that his Workmens Compensation insurance company told him to put Tritone back to work on light temporary job duty. He had Tritone measure doors and windows of his existing customers, so that, if one of the customers subsequently called in to report a broken window or door, they would know the size involved and could replace it without further measurement. This work was performed in anticipation of possible future work from his existing customers.

An examination of Tritone's work classification, background and the work that he performed during this three week period presents a difficult issue of whether he should be paid at the glaziers' hourly rate of \$22.05 or the glass workers' rate of \$13.23. He was a glazier and

had been paid at that rate during the five years of his employment with the Respondent. However, it is also clear that the work that he performed from March 28, 1994 through April 15, 1994 was less than classic glazier work. The only glazier-type work that he performed during this period was measuring store fronts and doors for possible future glass replacement.

5 However, I do not believe that it is necessary to examine his work during this period to determine the wage rate that he should have been paid. The Board's Decision and Order found that the Respondent violated the Act by unilaterally changing the wage rates of its glaziers and glass workers. Therefore, when these employees returned to work they had to be paid the wage rate prior to the unilateral change. Tritone was a glazier whose hourly wage rate was \$22.05
10 prior to the change, and that is the rate he had to be paid upon returning. In addition, Respondent's documents herein support Counsel for the General Counsel's allegations on this issue. Goldstein's January 31, 1994 letter to Tritone offering him reinstatement, states that it would be at "...100% of our current glazier's pay rate which is \$13.73 per hour..." However, that hourly rate was found to have been unlawfully instituted by the Respondent, and should have
15 been \$22.05. In addition, Goldstein's reinstatement offer of March 21, 1994 states: "This position is available for forty five days at which time we will evaluate your ability to perform your regular duties as a glazier." And finally, the notice that Tritone found at the Respondent's facility when he returned to work on March 28, 1994, in describing the Respondent's Workmens' Compensation program, stated that it provided "full wages" and "full seniority rights and wages"
20 for the injured employee. I therefore find that Tritone should have been paid at the glaziers' hourly wage rate of \$22.05 for the period March 28, 1994 through April 15, 1994.

On these findings of fact, conclusions of law and on the entire record, I issue the following recommended¹

ORDER

The Respondent, Harding Glass Company, Inc., its officers, agents, successors and assigns, shall make payments to the individuals and funds listed below, with interest.

The backpay to employees is as follows:

Robert Mosely	\$9,497.48 plus interest
James Tritone	\$975.89 plus interest
35 Richard Poirer	\$70,345.89 plus interest
James Gabrielle	\$18,846.38 plus interest
Richard VonMerta	\$11,273.69 plus interest
David Elworthy	\$6,979.14 plus interest
Mark Zaltberg	0
40 Christopher Carle	\$4,057.24 plus interest
Christopher Pelletier	\$16,191.19 plus interest
Kenneth Bullock	\$5,908.05 plus interest

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all
50 purposes.

The payments due to the Union funds is as follows:

5	Health and Welfare Fund	\$181,994.31 plus interest
	Pension Fund	\$87,735.79 plus interest
	Annuity Fund	\$85,914.46 plus interest
	Apprenticeship Fund	\$4,422.81.81 plus interest

Dated, Washington, D.C.

Joel P. Biblowitz
Administrative Law Judge